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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-082-53050 Office: CALIFORNIA SERVICE CENTER Date: MAR 18 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Architectural Landscape Decorator. It seeks to employ the beneficiary permanently in the United States as a moldmaker. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is December 9, 1997. The beneficiary's salary as stated on the labor certification is $11.67 per hour or $24,273.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. In a request for evidence (RFE) dated August 6, 2002, the director required additional evidence on each of those issues. Concerning the employer's ability to pay the proffered wage, the RFE noted that according to the record the beneficiary had been employed by the petitioner since 1994 and the RFE specifically requested the beneficiary's W-2 forms from 1994 to the present. The RFE also specified the information that would be needed in any letter describing the beneficiary's prior work experience.

In response to the RFE counsel submitted additional evidence, including tax returns for the petitioner for the years 1997 through 2000 and a letter confirming the prior work experience of the beneficiary. Counsel did not, however, submit copies of any W-2 forms for the beneficiary.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and also determined that the letter verifying the beneficiary's experience did not contain the information required for it to be considered as acceptable evidence. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. The evidence consists of an additional copy of the petitioner's 1997 tax return (for the tax year October 1, 1997 through September 30, 1998), copies of pay stubs

for the beneficiary from January 16, 2002 to December 11, 2002, and a copy of a letter dated January 17, 2003 from Leonel Diaz attesting to the beneficiary's prior work experience in Mexico.

The AAO will first evaluate the evidence submitted prior to the decision of the director. The evidence submitted on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS [formerly the Service or INS] will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

The director found that the petitioner appeared to have the ability to pay the proffered wage for 1998, 1999 and 2000, but not for 1997. The director stated that the Form 1120 corporate tax return for 1997 showed "total income" as $15,784.00. On the return that figure appears on line 28, for taxable income before net operating loss deduction and special deductions, and also on line 30 for taxable income. Although the director mislabeled the figure as "total income," that error did not cause an error in the director's analysis, since in considering a corporate petitioner's income the AAO looks to the figure for taxable income before net operating loss deduction and special deductions. The director correctly calculated that the amount of $15,784.00 shown on the 1997 tax return was $8,489.60 less than the proffered wage of $24,273.60 per year.

The director noted that the record showed the beneficiary to have been employed by the petitioner from 1994 to the present, but the director found that the failure of the petitioner to submit copies of the beneficiary's W-2 forms for that period prevented any determination of the amount the beneficiary was paid during that period. The director was correct on this point. Lacking any evidence on the salary paid to the beneficiary, the director properly evaluated the petitioner's ability to pay the entire proffered wage in each of the relevant years. Since the taxable income before net operating loss deduction and special deductions in tax year 1997 was significantly less than the proffered wage, the evidence pertaining to the petitioner's income fails to establish the petitioner's ability to pay during that year.

Counsel states in his brief that the year of 1997 was an anomaly for the petitioner, but no evidence was submitted on this point. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In evaluating the petitioner's ability to pay the proffered wage the AAO also looks not only to the petitioner's taxable income before net operating loss deduction and special deductions in any given year, but the AAO may consider other information pertinent to the petitioner's ability to pay. In the instant case, the Schedule L's attached to the petitioner's tax returns for 1997 through 2000 indicate net current assets which are higher than the proffered wage each year: $26,816 for the beginning of 1997, $48,420 for the end of 1997, $68,883 for the end of 1998, $117,332 for the end of 1999, and $240,511 for the end of 2000. These amounts are sufficient to establish the petitioner's ability to pay the proffered wage of $24,473.60 each year, including at the December 9, 1997 priority date.

For the foregoing reasons, it is concluded that the evidence submitted prior to the director's decision establishes the petitioner's ability to pay the salary offered as of the priority date of the petition and continuing until the present. The finding of the director that the evidence fails to establish the petitioner's ability to pay the proffered wage at the priority date was therefore incorrect.

The other ground on which the director denied the petition was a finding that the evidence failed to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

The Form ETA 750 indicated that the position of moldmaker required three years of experience in the job offered. The only evidence of the beneficiary's experience which was in the record prior to the director's decision was the letter dated July 11, 2002 which is discussed above. The letter is signed by Leonel Diaz on behalf of the Mexican firm "Taller De Marmoleria, Hermanos Diaz," which Mr. Diaz states in English as "The Diaz Brothers Ornamentation." The director correctly determined that this letter did not constitute acceptable evidence. The letter fails to state the dates of employment of the beneficiary, his hours of work, or his duties. The letter is not on the letterhead of the firm and it does not state the title of the signer Leonel Diaz. Moreover, the letter contains information which is inconsistent with the beneficiary's claim on the ETA 750 to have worked for "Mamoteria Dias" from January 1982 until June 1985. The letter states, "In 1980 my father closed the shop and my brother and I came to America." This letter therefore states that the shop was closed about two years prior to the date when the beneficiary claimed he began working there.

The evidence submitted prior to the director's decision therefore fails to establish that the beneficiary had the required experience as of the December 9, 1997 priority date.

The AAO will next consider the evidence submitted for the first time on appeal.

Concerning the petitioner's ability to pay the proffered wage, the evidence submitted for the first time on appeal consists of copies of pay stubs for the beneficiary from January 16, 2002 to December 11, 2002. These pay stubs show payments at the hourly rate of $13.50 for 40 hours per week during the period covered. This rate of pay is higher than the proffered wage. No W-2 form was submitted to corroborate these payments. Nonetheless, the AAO finds that the pay stubs are further evidence of the petitioner's ability to pay the proffered wage, and are consistent with the previously-submitted evidence, which in the analysis above the AAO finds sufficient to establish the ability of the petitioner to pay the proffered wage at the priority date and continuing to the present.

Concerning the beneficiary's qualifications, the only evidence submitted on appeal is the copy of a letter dated January 17, 2003 from Leonel Diaz attesting to the beneficiary's prior work experience in Mexico. The letter states that the beneficiary worked in the company "Marmoleria Hermanos Diaz" from January 1980 until December 1985. The letter is in English and it is not on the letterhead of the firm Marmoleria Hermanos Diaz. No envelope is included in the evidence. The letter is signed by Leonel Diaz, who also signed a previous letter dated July 11, 2002 attesting to the beneficiary's experience with that same firm. But the previous letter, as noted above, says that the shop was closed in 1980 and that Mr. Diaz had then come "to America." That information is inconsistent with the claim that the beneficiary worked for the firm from 1980 to 1985. The January 17, 2003 letter contains no explanation for this inconsistency. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In light of the foregoing unexplained evidentiary inconsistencies, the AAO finds that the January 17, 2003 letter submitted on appeal does not overcome the director's finding that the evidence fails to establish that the beneficiary had the required experience as of the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.